
(2015) 08 NCDRC CK 0020

In the National Consumer Disputes Redressal Commission

Mahindra Holidays And Resorts India Limited

APPELLANT

Vs

Hemant Kumar M. Wadekar

RESPONDENT

Date of Decision : 31-08-2015

Acts Referred:

Citation : (2015) 08 NCDRC CK 0020

Hon'ble Judges : K.S.CHAUDHARI J.

Final Decision : Petition Partly Allowed

Judgement

1. THIS revision petition has been filed by the petitioner against the order dated 12.12.2013 passed by the Maharashtra State Consumer Disputes Redressal Commission, Mumbai (in short, "the State Commission") in Appeal No. A/11/364 - Mahindra Holidays & Resorts India Ltd. v. Mr. Hemant Kumar M. Wadekar by which, while dismissing appeal, order of District Forum allowing complaint was upheld.

2. BRIEF facts of the case are that OP/petitioner had a scheme of providing membership for enjoyment of holidays in their own resorts in India and in abroad. The Complainant/respondent deposited a sum of 73,304/- in cash with the OP for membership for a period 01.05.2007 to 30.04.2032. The Complainant had selected two bedrooms apartments in Red category. The OP admitted the Complainant to memberships by giving Membership No. 255255 and also gave to the Complainant welcome kit and food vouchers worth Rs. 8,000/-. The Complainant thereafter paid further sums, in all totaling to 2,08,985/- to the OP. A friend of the Complainant was got married in February, 2007 and was to proceed abroad immediately. The Complainant therefore sought booking of a Resort at Mahabaleshwar for three days for the friend's honeymoon. The OP confirmed this booking and in turn informed his friend accordingly. The Complainant was informed at the eleventh hour that the booking had to be enjoyed by the Complainant himself and could not be transferred to others, leading to cancellation of the said booking. In December, 2006, the Complainant sought booking of a Resort in Bali, Indonesia from 12.05.2007 to 19.05.2007.

This was to be done by affiliate of the OP named RCI. RCI confirmed this on 5th December, 2006. Complainant's brother was to get married on 18.05.2007 and therefore, on 09.01.2007 i.e. more than four months in advance the Complainant sought rescheduling of the booking but the OP as well as the affiliate refused to reschedule the booking. Therefore, ultimately on 1st March, 2007, the Complainant requested for cancellation of the membership and sought refund. Ultimately, on 7th April, 2007 OP informed the Complainant that a sum of Rs. 1,25,391/- would be deducted towards charges for cancellation of membership, Rs. 7,500/- towards RCI enrollment charges, Rs. 8,000/- towards food vouchers, in all Rs. 1,40,891/- and offered to refund a sum of Rs. 68,094/- only. Alleging deficiency on the part of OP, complainant filed complaint before District forum. OP resisted complaint and submitted that the dispute be referred to arbitration in terms of membership rules. It was also stated that since the complaint was only for refund of money, the Complainant had to approach Civil Court rather than Consumer Forum. It was further stated that the rules provided for enjoyment of facilities at the Resorts by the members, but when friends of members were to enjoy such facilities some additional fees had to be paid. Since this additional fees were not paid by the Complainant booking at Mahabaleshwar had to be cancelled. As far as failure to reschedule the booking for Resort at Bali in Indonesia, it was stated that the booking had been confirmed by RCI. In the confirmation letter RCI clearly stated that booking would not be rescheduled. It is stated that since RCI had not been made party the complaint had to be dismissed. It was stated that as per Rule 6.2 the Complainant was entitled to an amount of Rs. 68,094/- which was offered to the Complainant and therefore, there was no force in the complaint and prayed for dismissal of complaint. Learned District forum after hearing both the parties allowed complaint and directed OP to refund Rs. 2,08,985/- with 9% p.a. interest and further directed to pay compensation of Rs. 10,000/- and cost of complaint Rs. 1,000/-. Appeal filed by OP was dismissed by learned State Commission with cost vide impugned order against which, this revision petition has been filed along with application for condonation of delay. Heard learned Counsel for the parties finally at admission stage and perused record.

3. AS far condonation of delay is concerned, petitioner in application for condonation of delay submitted that by publication of news in the paper he came to know about impugned order on 17.12.2013 and waited for copy of the order from State Commission, but as copy was not received, he applied for certified copy on 24.2.2014 which was received on 25.2.2014. Later on, matter was discussed with management and lawyers and revision petition was filed on 22.5.2014. In such circumstances, delay of 68 days may be condoned. As per office report there is delay of 60 days.

4. WHEN petitioner came to know about impugned order on 17.12.2013 he should have applied for certified copy immediately, but he waited for more than 2 months and then applied for certified copy and then filed revision petition within time from receiving certified copy. It would be proper to condone delay subject to

cost. Consequently, application for condonation of delay is allowed subject to payment of Rs. 5,000/- as cost to respondent and delay stands condoned. Learned Counsel for the petitioner submitted that in spite of deducting amount as per rules, learned District Forum committed error in allowing refund of whole amount and learned State Commission further committed error in dismissing appeal; hence, revision petition be allowed and impugned order be set aside. On the other hand, learned Counsel for the respondent submitted that order passed by learned State Commission is in accordance with law, as copy of rules was not supplied to respondent; hence, revision petition be dismissed.

5. IT is not disputed that complainant requested for cancellation of membership and OP while cancelling membership offered to refund Rs. 68,094/- against total payment of Rs. 2,08,985/-. The core question to be decided is whether deduction of so much amounts was permissible.

6. LEARNED Counsel for OP submitted that amount was deducted as per rules whereas learned Counsel for the complainant submitted that as rules were not supplied to him, amount was not liable to be deducted. Learned Counsel for the OP has drawn my attention towards membership application form signed by complainant and on last page Clause No. 1 & 2 runs as under: "1. I, We confirm having read this Membership Rules governing allotment of Club Mahindra Holiday Membership and the RCI Terms and Conditions and agrees to abide by the same. All necessary clarifications and information on the membership Rules have been provided to us.

2. I/We understand that the amounts paid towards Admission Fee (AF) is non - refundable".

As per Clause 1, complainant who has put his signatures confirmed having read membership Rules and agreed to abide by the same. On the other hand, learned Counsel for the complainant had drawn my attention towards e -mail dated 3.8.2006 to the complainant in which it was apprised that he will soon receive membership manual which contains membership details. In another e -mail dated 17.8.2006 by OP it was apprised that due to unprecedented rains, the stock procurement has been delayed and the same is expected in first week of September, 2006. These e -mail communications makes it clear that membership Rules kit was not provided to the complainant at the time of filling application form. In paragraph 6 of the written submissions, OP admitted that 30 to 45 days for delivery of membership kit is taken. He has also drawn my attention towards Club Mahindra Holidays Member Profile dated 18.6.2009 in which it was mentioned that membership kit need not be dispatched as cancellation request is pending. These documents clearly establish that membership kit was not provided to the complainant at the time of submitting membership application form. Merely by signing membership application form with this declaration that he confirms receipt of membership Rules, it cannot be presumed that he has received membership Rules in the light of admissions by OP. Learned Counsel for Respondent has placed reliance on judgment of Hon'ble Apex court dated

22.2.2000 - M/s. Modern Insulators Ltd. v. The Oriental Insurance Co. Ltd. in which it was observed as under:

"In view of the above settled position of law we are of the opinion that the view expressed by the National Commission is not correct. As the above terms and conditions of the standard policy wherein the exclusion clause was included, were neither a part of the contract of insurance nor disclosed to the appellant respondent cannot claim the benefit of the said exclusion clause. Therefore, the finding of the National Commission is untenable in law."

He also placed reliance on judgment of this Commission In F.A. No. 436 of 1995 - National Insurance Co. Ltd. v. Suman Oil Industries in which it was observed that when only cover note was given to the insured and insurance policy containing exclusion clause was not given, the Insurance Co. cannot claim benefit of exclusion clause. Similar view was expressed by this Commission in O.P. No. 122 of 1995 - M/s. Hundi Lal Jain Cold Storage and Ice Factory Pvt. Ltd. v. Oriental Insurance Co. Ltd. In such circumstances, in the light of aforesaid judgments it can be very well said that as membership Rules were not given to the complainant so far, amount cannot be deducted as per rules merely on the basis of declaration that he has read over membership Rules and received membership Rules.

Learned Counsel for OP has placed reliance on judgment of this Commission in OP No. 66 of 1992 - Tata Chemicals Ltd. v. Skypak Couriers Pvt. Ltd. in which it was observed that when a document containing contractual terms is signed, in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial whether or not he has read the document. This judgment is not applicable to the facts of the present case because in the case in hand membership Rules were not supplied and merely by declaring that he has read over all the Rules it cannot be presumed that he read over all Rules which runs into 6 pages in small print. He has also placed reliance on judgment of Hon"ble Apex Court in : (2013) 5 SCC 470 - Rajasthan State Industrial Development and Investment Corporation & Anr. v. Diamond & Gem Development Corporation Ltd. & Anr. in which it was observed that when parties have entered into a transaction with open eyes and understanding the nature of contract the contract is to be interpreted giving the literal meaning to the words contained in the contract and it is not permissible for the court to make a new contract. This judgment is not applicable to the facts of this case as we are not considering terms and conditions of the contract, but we are considering only this fact whether membership kit has been supplied to the complainant or not. As per aforesaid discussion, it has been established that membership kit has not been supplied so far and in such circumstances, complainant is not bound by terms and conditions of deduction of charges while getting his membership cancelled.

7. IN Clause 2 of membership application form, it has been mentioned that amount paid towards admission fee is non -refundable. As it is specific clause that amount paid towards admission fee is non -refundable which has been

signed by complainant, complainant is not entitled to refund of admission fees while getting membership cancelled. Perusal of correspondence between the parties also reveals that by e -mail dated 7.4.2007, OP apprised to the complainant that total deduction will be Rs. 1,40,891/- and complainant vide e -mail dated 14.4.2007 apprised OP that membership cancellation charges are apparently on higher side which makes it clear that complainant was aware that some charges are to be deducted while cancellation of membership and in such circumstances, it cannot be presumed that payment made towards admission fees was not liable to be deducted while refunding balance amount to which he agreed while signing membership application form. To this extent, learned District Forum committed error in allowing full refund and learned State Commission further committed error in dismissing appeal and to this extent, revision petition is to be allowed.

8. CONSEQUENTLY , revision petition filed by the petitioner is partly allowed and order dated 12.12.2013 passed by the State Commission in Appeal No. A/11/364 - Mahindra Holidays & Resorts India Ltd. v. Mr. Hemant Kumar M. Wadekar and order of District Forum dated 28.2.2011 passed in Complaint No. PDF/105/2009 - Hemant Kumar M. Wadekar v. Mahindra Holidays & Resorts India Ltd. is partly modified and OP/petitioner is directed to refund amount deposited by complainant after deducting admission fees amount and rest of the order is affirmed. Parties to bear their own costs.